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Peter J. Galie

Lawrence P. Galie

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I. Introduction

The retreat of the Burger Court from the Warren Court's expansion of constitutional rights has caused enlightened state supreme courts to ground their constitutional decisions on their own governing law. Some have retained or expanded the protection of individual liberties despite the direction of the present Supreme Court. The impact of this new awakening of state-court activism is that the individual state supreme courts can now, on remand, undercut the decisions of the United States Supreme Court and, thereby, render the Court's decisions moot. Justice Marshall's proposal in *Oregon v. Hass* is intended to remedy this problem that has arisen under the current doctrine of federalism. The authors support his proposed rule, with minor modification, since it is both reasonable and necessary to sustain the balance of the federal system.

In this article the authors will examine some of the unique problems created for the federal system when state supreme courts use their own constitutions and laws to create independent sources of individual substantive and procedural rights. First, the salient developments in this area of new state court activism will be outlined. Then the details and ramifications of Justice Marshall's proposal will be considered. Finally, the authors will review their points of agreement and disagreement with Justice Marshall's proposal. The purpose of this article is to suggest that a remedy is needed to counter the recent trend in this area of constitutional law. The authors believe Justice Marshall's proposal is the most persuasive remedy that has been offered and advocate its adoption.

* B.A. 1963 Villanova; Ph.D. 1970 University of Pittsburgh; Chairman, Political Science Department, Canisius College.
** B.A. 1974 The Pennsylvania State Univesity; J.D. 1977 University of Pittsburgh.

II. Justice Brennan's Campaign—State-Court Activism

> [S]tate Court judges, and also practitioners, [would] do well to scrutinize constitutional decisions by federal courts, for only if they are found to be logically persuasive and well-reasoned, paying due regard to precedent and the policies underlying specific constitutional guarantees, may they properly claim persuasive weight as guideposts when interpreting counterpart state guarantees.[1]

With these words, Justice Brennan has thrown down the gauntlet of constitutional decision-making, and has repeatedly[2] and vociferously[3] urged state courts to pick it up and to thereby become a new "Font of Individual Liberties."[4] It is clear that state courts are beginnning to accept this new role urged upon them by Justice Brennan. A variety of state supreme courts have recently begun to use their own, long dormant, state constitutional Bill of Rights and other statutory authority to afford greater protection for their citizens than the United States Supreme Court has deemed necessary under the United States Constitution.[5]

It is, of course, no coincidence that this independent expansion by state courts has occurred just as the Burger Court majority began to solidify. State courts are reacting to what they perceive as a massive retrenchment from the Warren Court's expansion of individual constitutional rights.[6] During the Warren Court era, the Supreme Court handed down many far-reaching decisions with which many state courts disagreed.[7] Since the decisions imposed the requirements upon the states as a matter of federal constitutional law, however, the supremacy clause[8] precluded the states from legally ignoring or defying these liberal interpretations. These state courts, although reluctant, have had to abide, since they could not grant fewer rights than the Supreme Court deemed necessary.

The current situation is somewhat different. Since state courts are the final arbiters of state law, they can grant whatever additional rights they please. Thus, when the Burger Court began to modify some of the

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1. Brennan, *State Consitutions and the Protection of Individual Rights,* 90 HARV. L. REV. 489, 502 (1977).

2. *See, e.g.,* United States v. Miller, 425 U.S. 435, 447 (1976) (Brennan, J., dissenting); Michigan v. Mosley, 423 U.S. 96, 112 (1976) (Brennan, J., dissenting); Oregon v. Hass, 420 U.S. 714, 726 (1975), (Marshall,J., dissenting).

3. *See* Michigan v. Mosley, 423 U.S. 96, 112 (1976) (Brennan, J., dissenting).

4. Brennan, *supra* note 1, at 491.

5. *See, e.g.,* People v. Disbrow, 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976); State v. Santiago, 52 Haw. 254, 492 P.2d 657 (1971); People v. Jackson, 391 Mich. 323, 217 N.W.2d 22 (1974); Commonwealth v. Triplett, 462 Pa. 244, 341 A.2d 62 (1975).

6. Indeed this is the reason given by Justice Brennan, *supra* note 1, at 495.

7. The extent of this disagreement and its impact is investigated in the following works: THE SUPREME COURT AS POLICY MAKER: THREE STUDIES ON THE IMPACT OF JUDICIAL DECISIONS (D. Everson ed. 1972); THE IMPACT OF SUPREME COURT DECISIONS (2d ed. T. Becker & N. Feeky eds. 1972); Romans, *The Role of State Supreme Court in Judicial Policy-Making: Escobedo, Miranda And The Use Of Judicial Impact Analysis,* XXVII W. POL. Q. 38 (1974).

8. U.S. CONST. art. VI.

liberal decisions[9] of the Warren Court by curtailing individual rights, state courts, because of the peculiar nature of the federal system, had a weapon through which they could express their disagreement with the Supreme Court. That is, they could implement their own individual views as law, at least in their own states.

The retrenchment by the Burger Court, particularly in the areas of the fourth, fifth, and sixth amendments, must have made at least some state court judges feel like soldiers who had at one time been prodded by their superiors to get out and do their duty on the front line and who were then told to beat a hasty and not too orderly retreat.[10] Like troops placed in such a situation, the various state supreme courts have reacted in their own way. Many courts have beat a hasty retreat, never having desired to go to the front line in the first place. Others have not recovered from the shock and are taking haphazard steps first in one direction, then in another.[11] A minority of state supreme courts have, for a variety of reasons, accepted or grown comfortable with the Warren Court's decisions. It is these courts that, by grounding their decisions on state laws and constitutions, have granted more extensive constitutional protection than is required by the Constitution under current Supreme Court interpretations.[12]

It is not too difficult to understand why Justice Brennan welcomes an activist role for the state courts. Justice Brennan is a liberal jurist who helped fashion many of the Warren Court's landmark decisions. He now finds himself in a minority position, opposing a more conservative majority in this area of criminal procedural rights, with little hope of having his views prevail. But, if Justice Brennan is successful in his "campaign"[13] of convincing state courts to depart from Supreme Court decisions by relying on state constitutions, he will indirectly prevent the Burger Court from limiting the Warren Court decisions. Thus, by this indirect route he will have been successful in convincing others to do what he cannot do because of his present minority position on the Court.[14]

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9. *See, e.g.*, Paul v. Davis, 424 U.S. 693 (1976); Washington v. Mosley, 423 U.S. 96 (1976).

10. See particularly the charges raised in Dershowitz & Ely, *Harris v. New York, Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198 (1971); Totenberg, *Behind the Marbel, Beneath the Robe*, N.Y. TIMES March 16, 1976 (Magazine).

11. For a discussion of the confusion in the Ohio courts, see Child, *The Involuntary Confession and the Right to Due Process: Is a Criminal Defendant Better Protected in the Federal Courts than in Ohio?* 10 AKRON L. REV. 261 (1976).

12. *See* note 5 *supra*.

13. It is referred to as a "campaign" because of the repetitiveness and forcefulness with which Justice Brennan urges the states to use their own constitutions more frequently. *See* notes 1 and 2 and accompanying text *supra*.

14. Justice Brennan's position is not without its ironies. He is not a newcomer to the question of federal-state relationships, states rights, and the United States Bill of Rights. In 1963 he published a short essay in which he stated his position somewhat differently. Brennan, *The Bill of Rights and the States* in THE GREAT RIGHTS (E. Kahn ed. 1963). While acknowledging with "deep satisfaction" the many states that "effectively enforce the

This development in federalism and constitutional law has been almost universally praised as a healthy one.[15] Professor Wilks calls it "an astonishing development in criminal procedure" and a "harbinger of a new era in criminal procedure."[16] He also characterizes these state court decisions as "evasion cases" and define them as follows:

> An 'evasion' case has two characteristics. First, it rests on a state-based right which at a minimum is coextensive with a federal right. Second, the language of the opinion or the circumstances in which is was delivered make it apparent that the state court intended to use the adequate state ground doctrine to avoid Supreme Court review.[17]

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counterparts in state constitutions of the specifics of The Bill of Rights," his major point was that "[t]he Bill of Rights is the primary source of expressed information as to what is meant by constitutional liberty. The safeguards enshrined in it are deeply etched in the foundations of America's freedoms." *Id.* at 19-20. In 1964 he addressed the Conference of Chief Justices of the state courts as follows:

> The Supreme Court of the United States cannot escape its responsibility for the ultimate definition and application of that [equal protection] guarantee. . . . The Bill of Rights is the primary source of expressed information as to what is meant by constitutional liberty.

Brennan, *Some Aspects of Federalism,* 39 N.Y.U.L. REV. 945, 955 (1964). Those words might well be repeated in the near future by some member of the Burger Court in reaction to the assertion by state judiciaries of their "New States Rights."

15. Falk, *Foreward: The State Constitution—A More than "Adequate Nonfederal Ground,"* 64 CAL. L. REV. 273 (1973); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court,* 62 VA. L. REV. 873 (1976); Wilkes, *More on the New Federalism in Criminal Procedure,* 63 KY. L.J. 873 (1975); Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court,* 62 KY. L.J. 421 (1974); *Project Report: Toward an Activist Role for State Bills of Rights,* 8 HARV. C.R.-C.L. L. REV. 271 (1973). Professor Howard generally approves of this development; but attempts to set down some general rules or guidelines to aid courts in determining when such independence should be exercised and when it should not. Bice, *Anderson and The Adequate State Ground,* 45 S. CAL. L. REV. 750 (1972). Bice is concerned about this development, but only insofar as no solution is found to the problem of use of state grounds to insulate state court decisions from both federal court review and state political processes. The most critical or perhaps sceptical commentary on this development can be found in Note, *State Constitutional Guarantees as Adequate State Ground: Supreme Court Review and Problems of Federalism,* 13 AM. CRIM. L. REV. 737 (1976). The note offers a proposal that will prevent insulation on the basis of the Adequate State Grounds Doctrine when there are "substantial federal interests [such that] a Supreme Court decision is desirable." *Id.* at 757. Discussion of this proposal can be found at notes 78-80 *infra.*

16. Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court,* 62 KY. L.J. 421, 425 (1974).

17. Wilkes, *More on the New Federalism on Criminal Procedure,* 63 KY. L.J. 873 n.2 (1975). Use of the term "evasion" to describe this phenomenon raises several probelms. For example, the past use of the term has been almost universally associated with attempts by lower federal and state courts to limit the impact of Supreme Court decisions involving the extension of federal rights. Beatty, *State Court Evasion of United States Supreme Court Mandates During the Last Decade of the Warren Court,* 6 VAL. U. L. REV. 260 (1972); Note, *Evasion of Supreme Court Mandates in Cases Remanded to State Courts since 1941,* 67 HARV. L. REV. 1251 (1954); Note, *Final Disposition of State Court Decisions Reversed and Remanded by the Supreme Court, October Term, 1931, to October Term, 1940,* 55 HARV. L. REV. 1357 (1942); Note, *State Court Evasion of United States Supreme Court Mandates,* 56 YALE L.J. 574 (1947). Beatty defines evasion as follows: "[A] truly "evasive" state court action does not occur unless the state court which resists the initial Supreme Court mandate is overruled for a second time by the Court. Even in these cases evasion is conditioned upon the clarity of the original mandate of the Supreme Court." Beatty, *supra* at 263. A rebuttal note to Beatty appeared in a subsequent issue, Schneider, *State Court Evasion of the United States Supreme Court Mandates: A Reconsideration of the Evidence,* 7 VAL. U.L. REV. 191 (1972). The crux of Schneider's case is that Beatty's definition is much too restrictive and

Whether one approves or disapproves of this development, it poses certain difficult problems for the Supreme Court, and these problems go to the heart of the role of the Supreme Court in a federal system. It is in this context that the authors wish to examine Justice Marshall's proposed rule.

III. Justice Marshall's Proposal

In 1975 the Court decided *Oregon v. Hass,*[18] in which it held that inculpatory information given to the police by a defendant on the way to

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excludes a variety of avoidance or evasive tactics used by lower courts that would not be covered by Beatty's definition. He cites numerous studies by political scientists working in this area as examples of these different techniques. *Id.* at 192.

Stephen Wasby, a political scientist, has published the most thorough analysis of terms like evasion, avoidance, and compliance. *See* W. WASBY, THE IMPACT OF THE UNITED STATES SUPREME COURT: SOME PERSPECTIVES (1970). He writes that evasion is "action short of defiance such that the decision does not apply" and the Court "avoids a situation where that non-compliance would become an issue." *Id.* at 30. He concludes that talking about evasion is not possible without "examining motive and intent." *Id.* at 32.

Given this background, the use of the term "evasion" may be misleading or perhaps unhelpful in that it may be important to conceptualize this phenomenon differently than the defiance or evasion that involves attempts to deny or limit the scope of federal rights. Of course, as Bice points out, any attempt to preclude federal review because the federal courts would decide the federal question differently is discriminatory regardless of whether the federal decision would be "broader" or "narrower" than the state court interpretation. Bice, *supra* note 15, at 752-53. Wilkes' definition of evasion is probably adequate to measure the intent necessary under Wasby's view and to discriminate between the "broader" and "narrower" decision, but it raises a series of problems. Is this restrictive definition helpful? If motive ultimately is not important for purposes of Supreme Court review, then the more constitutionally relevant inquiry is whether the state has power to effect its decision assuming the distribution of power in the federal system and whether this power ought to be modified or restricted.

A number of courts had extended rights beyond what the Warren Court had required. For example, in State v. Browder, 486 P.2d 925 (Alas. 1971), the Supreme Court of Alaska went beyond Bloom v. Illinois, 391 U.S. 194 (1968). The court explained,

> Not only do we think that the plain meaning and spirit of *Baker* requires rejection of *Bloom's* denial of the right of jury trial in non-serious cases of criminal contempt, but we are also convinced . . . that no exception to the right to jury trial should be made for petty contempts where imprisonment is a potential sanction . . . . We . . . hold, . . . that article I, section 11 of the Alaska Constitution guarantees the accused the right to jury trial for a direct criminal contempt.

486 P.2d at 957-58. Would this constitute "evasion" under Wilkes' standard? Would the statement by the court that it has a responsibility to interpret the state constitution as well as to enforce minimal constitutional standards imposed by the Supreme Court constitute evidence of evasion? Or would the judges have to act in the belief that the Supreme Court may disagree with their interpretation? Another way of analyzing this point is to ask, would an expansive reading during the Warren Court era have been nonevasive (*i.e.*, when the state court did not anticipate a reversal), but have become evasive during the era of the Burger Court? Some courts had resorted to the state constitutions before the Burger Court solidified, and their continued use of state law may be as much a part of this tradition as it is a conscious attempt to insulate these decisions from a possible Supreme Court reversal. There will also be many cases in which a court will not clearly express its intent.

Wilkes' remarks in criticizing another proposal seem pertinent to his own definition. He writes, "Judgments as to motivation are difficult and time consuming." Wilkes, *supra* note 15, at 450. The authors agree and wonder if the result rather than the motivation or intent is not the crucial consideration. If the authors had to choose a word here, given the past history of the use of "evasion" by lawyers and social scientists, they would choose "avodiance" or "preclusion" of Supreme Court review. These words avoid the connotative history of "evasion" and move away from the indefinite focus of intent.

18. 420 U.S. 714 (1975).

the police station, after he was given the *Miranda* warnings but before he was permitted to consult a lawyer as he had requested, was admissible, but only for impeachment purposes under the rule of *Harris v. New York*.[19] Justice Marshall, in a dissent joined by Justice Brennan, complained of the "Court's increasingly common practice of reviewing state-court decisions upholding constitutional claims in criminal cases."[20] Justice Marshall wrote that "we have too often rushed to correct state courts in their view of federal constitutional questions without sufficiently considering the risk that we will be drawn into rendering a purely advisory opinion."[21] In addition to this advisory opinion, Justice Marshall expressed his belief that it is a better judicial policy to allow state courts to strike the balance between individual rights and police practices.[22] With the rule against advisory opinions and the considerations of federalism in mind, Mr. Justice Marshall formulated and proposed the rule that "the Court should not review a state-court decision . . . unless it is quite clear that the state court has resolved all applicable state-law question."[23] This proposal was not heard, however, above the din in the law reviews over the new states rights.[24]

A. Scope of Proposed Rule

To determine the soundness and feasibility of the Marshall proposal, it is necessary first to understand precisely what Justice Marshall attempted to advocate. His formulation, if read literally, appears to suggest that in every case in which a state law is applicable,[25] the state court must look to that state's law before ever reaching the issues of federal law. If a state court fails to apply its own law and reverses a conviction on the basis of its interpretation of federal law, Justice Marshall would have the Court refuse to review the decision. This proposal assumes that in such a case there exists an adequate and independent state ground that could be applied by the state court on remand and that would render the Court's decision merely advisory.[26]

Justice Marshall would clearly apply this rule whenever defendant bases his defense upon both state and federal grounds. But what of a situation in which a defendant fails to raise the state-law issue and instead predicates his claim solely on federal law? Apparently Justice Marshall would apply the rule even in this situation and refuse to review the lower

19. 401 U.S. 222 (1971).
20. 420 U.S. at 726 (Marshall, J., dissenting).
21. *Id.*
22. *Id.* at 728.
23. 420 U.S. at 729.
24. See the works cited in note 15 *supra*.
25. This includes almost every conceivable criminal case. In fact, the overwhelming number of cases in which state courts have applied their own law are criminal cases. *See* note 5 *supra*.
26. Herb v. Pitcairn, 324 U.S. 117 (1945).

judgment. A literal reading of the formulation indicates that he would require state courts to raise the state-law issue sua sponte if a defendant fails to argue the issue. Otherwise the Court will refuse review. Justice Marshall seemed to demand this reading of his rule when he asserted that "the court should not review a state-court decision . . . unless it is quite clear that *the state court has resolved all applicable state-law questions.*" [27] Note that not merely those issues raised by the defendant, but all applicable state-law questions must be resolved completely by the state court. In addition, Justice Marshall observed at the end of his dissenting opinion, "Surely the majority does not mean to suggest that the Oregon Supreme Court is foreclosed from considering the respondent's state law claims or even ruling *sua sponte* that the statement in question is not admissible as a matter of state law."[28] These two statements indicate that Justice Marshall would require state courts to raise state-law questions sua sponte, even when the defendant fails to do so.

Formulated in this way, the rule is indefensible. It would allow state courts to preclude Supreme Court review of those cases that most clearly should be reviewed by the Court—state court decisions that are based on federal law. For example, if a defendant failed to raise a state-law issue and the state court refused to resolve its applicability sua sponte, but instead reversed the conviction on federal grounds, then Justice Marshall's rule would preclude Supreme Court review of this federal question.

It is probably safe to assume that Justice Marshall never intended this result, but merely painted his new rule with too broad a brush. In addition, it appears that Justice Brennan, who concurred in Justice Marshall's dissent in *Oregon v. Hass*[29] and in many other cases in which similar sentiments were expressed,[30] apparently did not view Justice Marshall's rule so broadly.

> Although my brother Marshall correctly argued in *Hass* [citation omitted] that we should have remanded for the state court to clarify whether it was relying on state or federal law, such a disposition is not required here. In *Hass* the state court cited both federal and state authority; in this case Mosley's Counsel has conceded that the self-incrimination argument in the state court was based solely on the Fifth Amendment to the Federal Constitution.[31]

It is clear that Justice Brennan thought Justice Marshall's rule permitted Supreme Court review even though state law was not raised as an

27. 420 U.S. at 729 (emphasis added).

28. *Id.*

29. *Id.* at 726. (Marshall, J., dissenting). Justice Brennan wrote his own dissent in *Hass*, in which Marshall concurred, disagreeing with the majority decision on the merits.

30. *See* Baxter v. Palmigiano, 425 U.S. 308, 324 (1976) (Brennan, J., concurring in part, dissenting in part); Paul v. Davis, 424 U.S. 693, 714 (1976) (Brennan & Marshall, JJ., dissenting); Texas v. White, 423 U.S. 67 (1975) (Brennan, J., dissenting).

31. Michigan v. Mosley, 423 U.S. 96, 120 n.8 (1976) (citations omitted).

issue by the defendant. In other words, Justice Brennan does not interpret Justice Marshall's proposed rule as mandating that the failure of state courts to raise a state-law issue forecloses Supreme Court review. Therefore, for purposes of this analysis, it will be assumed that Justice Marshall's proposed rule provides that the Supreme Court will not review a state-court decision when the lower court ignored a state-law issue raised by the defendant and instead reversed a conviction on the basis of federal law.

The purpose of this article will be to show that such a rule, with one modification, is eminently sensible and that it should be adopted by the Court. The modification suggested by the authors goes to the remedy; if a state-law issue is raised by a defendant and ignored by the state court on appeal, the Supreme Court should vacate the judgment and remand for the state court to decide the state law question. The reasons for the adoption of the rule are as follows: it would enable the Court to avoid rendering advisory or unnecessary opinions; it would resolve the perplexing problem of attempting to discern upon which law the lower court's decision rests; in accordance with the doctrine of federalism it would establish a policy of permitting the individual states to strike the delicate balance when the state interest is paramount to the federal interest; it would also help maintain the state's political balance; and finally, it would greatly promote needed judicial economy.

B. Feasibility of the Proposal—Supporting Analogous Doctrines

1. Rule Against Advisory Opinions.—Professor Wilkes in discussing the evasion cases states, "The evasion analyzed here involves no lawless defiance of the Court; rather, it is accomplished by the expedient of exploiting loopholes in the Court's power of review."[32] The "loophole" referred to is the Court-formulated rule that it will not review a state-court decision if it rests on an adequate,[33] tenable,[34] and independent[35] nonfederal[36] ground. This rule is termed the Adequate State Grounds Doctrine, and it has been consistently followed by the Court. The seminal case on this point is *Murdoch v. City of Memphis*[37] in which the Court held,

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32. Wilkes, *supra* note 15, at 425.

33. A state ground is adequate when it is legally sufficient as a nonfederal ground to foreclose review of an accompanying federal question.

34. Ward v. Board of County Comm'rs, 253 U.S. 17, 22 (1920); Leathe v. Thomas, 207 U.S. 93, 99 (1907); Note, *The Untenable Nonfederal Ground in the* Supreme Court, 74 HARV. L. REV. 1375 (1961).

35. The Supreme Court will take jurisdiction when the nonfederal ground is so interwoven with the federal ground as to render them inextricable. Enterprise Irrigation Dist. v. Farmer Mut. Canal Co., 243 U.S. 157 (1917).

36. The nonfederal ground must be broad enough with reference to the federal question to sustain this judgment. Eustis v. Bolles, 150 U.S. 361 (1893); Murdoch v. City of Memphis, 87 U.S. (20 Wall.) 590 (1874).

37. 87 U.S. (20 Wall.) 590 (1874).

> But when we find that the State court has decided the Federal question erroneously, then to prevent a useless and profitless reversal, which can do the plaintiff in error no good, and can only embarrass and delay the defendant, we must so far look into the remainder of the record as to see whether the decision of the Federal question alone is sufficient to dispose of the case, or to require its reversal, or, on the other hand, whether there exists other matters in the record actually decided by the State court which are sufficient to maintain the judgment of that court, notwithstanding the error in deciding the Federal question. In the latter case the court would not be justified in reversing the judgment of the State court.[38]

From this language it would appear that the Court was merely expressing a rule of convenience, since it did not state any constitutional reasons for the Adequate State Grounds Doctrine.[39] Subsequent decisions, however, did impute a constitutional basis for the doctrine. The most explicit supportive statement came in the landmark case of *Herb v. Pitcairn.*[40] In that case the Court gave two reasons for the doctrine, but confused them as merely being one. Both reasons are expressed as follows:

> This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and Federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge Federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion.[41]

In the first half of this passage the Court states that adequate state grounds constitute a limitation on the federal courts that is inherent in the federal scheme. The Court speaks of power and who possesses it. The constitutional plan, however, envisioned making state courts the final arbiters of state law; consequently, this constitutional limitation prevents the Court from deciding questions of state law. Having accepted the proposition that the Court has power to decide only the federal issues arising in state litigation, the Court looked to another well settled rule—the rule prohibiting the Court from rendering advisory opinions when adequate state grounds exist.[42] It is the confluence of these two doctrines that resulted in the judicial formulation of the Adequate State Grounds

38. *Id.* at 635.

39. Justice Harlan did detect constitutional roots underlying the court's decision in *Murdoch. See* Fay v. Noia, 372 U.S. 391, 464-65 (1963) (Harlan, J., dissenting).

40. 324 U.S. 117 (1945).

41. *Id.* at 125-26 (citations omitted).

42. *See* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 64-70 (2d ed. 1973) [hereinafter cited as HART & WECHSLER].

Doctrine.[43]

Whether the doctrine is constitutionally compelled has never been resolved. Mr. Justice Bradley in his dissent in *Murdoch* argued that the result reached was not constitutionally compelled, because Article III "declares that the judicial power shall extend to all *cases*, in law and equity, arising under this Constitution, the laws of the United States and treaties made under their authority—not to all *questions*, but to all *cases*."[44] Mr. Justice Harlan, however, has argued more recently that the doctrine is constitutionally compelled. In his dissent in *Fay v. Noia*,[45] he argues as follows:

> But as the court in *Murdoch* so strongly implied, and as emphasized in subsequent decisions,[46] the adequate state ground rule has roots far deeper than the statutes governing our jurisdiction and rests on fundamentals that touch this Court's habeas corpus jurisdiction equally with its direct reviewing power. As examination . . . will . . . confirm that the rule is one of constitutional dimension going to the heart of the division of judicial powers in a federal system.[47]

The authors contend that Justice Harlan is correct in asserting that the Adequate State Grounds Doctrine is constitutionally compelled. If state courts are the final arbiters of state law, the Supreme Court cannot constitutionally reverse a state court determination of state law. In this contest, the question is one of power and where it lies in the federal system. As former Justice Curtis noted, "[Q]uestions of jurisdiction [are] questions of power as between the United States and the several states."[48] The proper role of the Supreme Court is first to determine whether there is an adequate and independent nonfederal ground for the state-court decision. If one exists, the Court is constitutionally denied power to review. Justice Harlan explains, "[D]etermination of adequacy and independence of the state ground . . . marks the constitutional limit of our power in this sphere."[49]

If the Adequate State Grounds Doctrine is constitutionally mandated, then Justice Marshall's rule is also arguably required by the Constitution. The reasons that support the doctrine are also applicable

43. *See generally* Sandalow, *Henry v. Mississippi and the Adequate State Ground: Proposals for a Revised Doctrine*, 1965 S. CT. REV. 187; Note, *The Untenable Nonfederal Ground in the Supreme Court*, 74 HARV. L. REV. 1375, 1377-79 (1961); Comment, *Due Process and the Supremacy Clause as the Foundation of the Adequacy Rule: The Remains of Federalism after Wilbur v. Mullaney*, 26 ME. L. REV. 37 (1974).

44. 87 U.S. (20 Wall.) 590, 641 (1874) (emphasis added). The fact that the issue has been squarely faced only in dissenting opinions illustrates the confusion that continues one hundred and two years after *Murdoch* was decided.

45. 372 U.S. 391 (1963).

46. This was an obvious reference to Herb v. Pitcairn, 324 U.S. 117 (1945). It is curious that Justice Harlan did not rely on the *Herb* decision more heavily, since that case supports his view more clearly than does *Murdoch*.

47. 372 U.S. at 464 (Harlan, J., dissenting).

48. 2 THE LIFE AND WRITINGS OF B.R. CURTIS 341 (Curtis ed. 1879).

49. Fay v. Noia, 372 U.S. 391, 466 (1963) (Harlan, J., dissenting).

when a state-law issue is raised in, but not resolved by, the state court.[50] It is not the authors' intention, however to show that Justce Marshall's view is constitutionally compelled. Rather, the following discussion will show that its adoption is desirable in light of all the existing reasons for the Adequate State Grounds Doctrine, since Justice Marshall would require the state court to resolve all state law issues raised by the litigants before turning to federal law.

One of the strongest reasons given for the adoption of the Adequate State Grounds Doctrine is that it is necessary to prevent the Court from rendering advisory opinions. It is not clear whether the prohibition against advisory opinions, like the basis for the Adequate State Grounds Doctrine, is rooted solely in tradition or in the Constitution.[51] The prohibitive rule can, however, be traced to the "cases and controversies" requirement mandated by the grant of jurisdiction to the Supreme Court in Article III.[52] The rationale is that if the Court reverses a state-court decision that rested on adequate and independent nonfederal grounds, the state-law basis would still control the final holding of the case on remand, and the Supreme Court's decision would not have affected the final outcome of the litigation and would, therefore, be rendered advisory.[53] If this same standard of what constitutes an advisory opinion were applied to the situation in which the defendant raises a state constitutional defense that is ignored by the state supreme court because it instead bases its decision on the Federal Constitution, the Supreme Court could grant review and hold that the state court misinterpreted federal law.[54] If it does so, however, the state court is free to apply its own law on remand and to thereby render the decision of the Court unnecessary at best.[55]

The two situations are distinguishable. In the former, the state-law grounds were ever present, and so it was clear from the outset that if the Court rendered an opinion it probably would be ineffectual. In the latter situation, it is not clear to the Court at the moment it grants review whether the state court would be willing to rely entirely and independently on state law. It could be that a Court decision in such a case will end the litigation, but on remand the state court might decide to rely on a previously ignored state ground to uphold its earlier decision, thus rendering the Supreme Court decision retroactively moot and "advisory."

50. *See* note 35 and accompanying text *supra*.

51. HART & WECHSLER, *supra* note 42 at 64-70.

52. U.S. CONST. art. III, § 2.

53. *See, e.g.*, Herb v. Pitcairn, 324 U.S. 117 (1945); Fox Film Corp. v. Muller, 296 U.S. 207 (1935); Murdoch v. City of Memphis, 87 U.S. (20 Wall.) 590 (1874).

54. This assumes the basis for the decision is not ambiguous; *i.e.*, even though state law may have been mentioned, the decision turned on federal law.

55. To what extent these decisions can legitimately be called advisory is a question that will be discussed later. Suffice it to say at this point that the decision would at least provide some federal constitutional guidance and define the issue in controversy for other federal courts.

The question is whether the Supreme Court ought to decide the federal question in the latter situation. It is the authors' opinion that the Court should not grant review. Arguably, if this were any other time in judicial history, the number of cases in which a state court would uphold its earlier decision by relying on state law on remand would be so insignificant that these instances could be safely ignored. But state courts in recent years have increased their reliance on state law to grant greater rights to defendants than the Supreme Court has found necessary under the Federal Constitution.[56] This type of case will continue to arise, perhaps with even greater frequency in the future.

In *South Dakota v. Opperman*[57] the Supreme Court was confronted with a case that presented the hypothetical problems outlined above. The South Dakota Supreme Court had reversed a defendant's conviction, holding that the contraband used to convict him was seized pursuant to an inventory search that was unreasonable under the standards of the fourth amendment of the United States Constitution. The Supreme Court granted certiorari and in a five-four decision reversed the state-court decision, ruling that the search did not violate the fourth amendment.[58] Upon remand, the South Dakota Supreme Court again held that the search was unreasonable, but this time held that the search was unreasonable on state constitutional grounds.[59]

The court's language is both pertinent and interesting.

> Admittedly the language of [the South Dakota Constitution] is almost identical to that found in the Fourth Amendment; however, we have the right to construe our state constitutional provision in accordance with what we conceive to be its plain meaning. We find that logic and a sound regard for the purposes of the protection afforded by [the South Dakota Constitution] warrant a higher standard of protection for the individual in this instance than the United States Supreme Court found necessary under the Fourth Amendment.[60]

By so ruling, the South Dakota Supreme Court effectively insulated its decision from further review.[61]

Opperman is significant in two respects. First, it was decided in a state that is not considered particularly innovative, at least not judicially. If South Dakota exercises this kind of independence, it suggests that other jurisdictions will begin to do likewise.[62] Second, because the court waited until remand to apply its own law, it rendered the Supreme Court's

56. *See* note 5 *supra*.
57. 428 U.S. 364 (1976).
58. *Id.*
59. State v. Opperman, — S.D. —, 247 N.W.2d 673 (1976).
60. *Id.* at 674-75 (footnotes omitted).
61. Oregon v. Hass, 420 U.S. 714 (1975).
62. Indeed, to reach its decision, the court had to ignore defendant's failure to follow state procedure in two instances. The defendant never raised the state constitution as an issue in the first appeal and the filing of the petition for the rehearing was not timely. — S.D. —, 247 N.W.2d at 675.

decision at worst advisory and at best completely unnecessary.[63]

Opperman is part of a trend that will, if the Adequate State Grounds Doctrine is not modified, cause an increasing number of the Court's opinions to be rendered unnecessary. The authors submit that Justice Marshall's proposal, by requiring that state courts initially resolve all state law issues, would prevent unnecessary Supreme Court review in many, if not most, of the cases like *Opperman* that are now destined to follow.[64]

2. Ambiguous State Grounds.—Another defect in the current formulation of the Adequate State Grounds Doctrine is that it requires a case by case determination of whether the state court could have based its decision on federal or state law.[65] Often state courts cite both state and federal law as well as state and federal judicial precedents.[66] It is no small problem for the Court to determine whether an adequate and independent state ground exists as the Court noted in the following passage in *Herb v. Pitcairn*:

> But what to do with cases in which the record is ambiguous but presents reasonable grounds to believe that the judgment may rest on decision of a federal question has long vexed the Court. In many cases the answer has been a strict adherence to the rule that it must affirmatively appear that the federal question was decided and that its decision was essential to disposition of the case; and that where it is not clear whether the judgment rests on a Federal ground or an adequate state one, this Court will not review.[67]

What to do with the ambiguous state-ground cases has puzzled not only the courts,[68] but also the commentators.[69] Justice Marshall's proposal would have the Supreme Court simply refuse to review a judgment in which a state court failed to resolve a state-law issue, but arguably based its decision reversing a conviction on federal law. This course, unless modified, would be an unwise one to follow. If a state court cited both state and federal law, the decision might well have been predicated primarily on federal law. Certainly few would challenge the proposition

63. Earlier cases in which a Supreme Court opinion was subsequently rendered superfluous include Schuylkill Trust Co. v. Pennsylvania, 302 U.S. 506 (1938); Georgia R. & Elec. Co. v. Decatur, 297 U.S. 620 (1936).

64. Marshall's proposal would not have prevented the *Opperman* case from arising, since in that case, the defendant never raised an issue of state law. But in view of all the publicity given to state courts that rely on state law, defense counsel in the future will almost always, as a matter of course, raise all state law issues.

65. Note, *Supreme Court Treatment of State Court Cases Exhibiting Ambiguous Grounds of Decision*, 62 COLUM. L. REV. 822 (1962).

66. *See, e.g.*, Paschall v. Christie-Stewart, Inc., 414 U.S. 100 (1973); Minnesota v. Nat'l Tea Co., 309 U.S. 551 (1940).

67. Herb v. Pitcairn, 324 U.S. 117, 126 (1945).

68. *See* cases cited at note 66 *supra*.

69. *See, e.g.*, Stolz, *Federal Review of State Court Decision of Federal Questions: The Need for Additional Appellate Capacity*, 64 CAL. L. REV. 943 (1976).

that state-court decisions applying federal law are properly subject to review by the Supreme Court. The problem arises when litigants raised state-law issues that were ignored by the state court, which instead relied on federal law.

Justice Marshall, in an effort to force states to apply their own law before reaching the federal question, would have the Supreme Court refuse review of these cases. This is an untenable position, since the Supreme Court, by following this procedure, would be abdicating its role as the final tribunal of appeal on federal questions.[70] It would also enable state courts to effectively insulate their decisions from any sort of review.[71] By ignoring state-law issues and applying federal law, state supreme courts could, under Justice Marshall's proposal, not only insulate their decisions from Supreme Court review, but could also effectively prevent the state political processes from affecting their decisions, since they would rest on federal law. This would "increase the state court's decision-making power vis-à-vis other branches of the state government, perhaps beyond the effective control of even a supra-majority of the state citizens."[72]

3. Suggested Solutions.—What is needed is a remedy that will require state courts to decide issues of state law[73] before turning to federal law. It must be a remedy that can be implemented without diluting the Supreme Court's role as final arbiter of federal law and without disrupting the state's political balance.

Professor Bice proposes that when a state court creates an ambiguity, the Supreme Court should always grant review. If the state court on remand upholds its earlier decision on grounds that it was based on state law, then so be it. He suggests that it will at least be clear upon which law the state court relied and that the decision will not be insulated from the state's political bodies.[74] Professor Bice's proposal deals only with those cases in which there is ambiguity and in which there is a possibility that the decision will be insulated. It does not treat the problem of state courts not deciding all relevant state law issues raised by a defendant when there is no ambiguity. Moreover, Professor Bice's proposal has been criticized because it would "require the United States Supreme Court to render 'advisory' opinions of the most hypothetical sort."[75]

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70. *See* Hart, *The Relations Between State and Federal Law,* 54 COLUM. L. REV. 489 (1954).

71. Bice, *Anderson and the Adequate State Ground,* 45 SO. CAL. L. REV. 750 (1972).

72. *Id.* at 757-58.

73. It is assumed here and elsewhere in this paper that there is an applicable state law.

74. Bice, *supra* note 71, at 760-61.

75. Falk, *Foreward to* Note, *The State Constitution: A More Than "Adequate" Nonfederal Ground,* 61 CAL. L. REV. 273 (1973). Ever since the decisions in *Murdoch* and *Pitcairn* (see text at notes 38 and 41 *supra*) were handed down, most commentators have assumed that for the Court to decide the federal question when there are also adequate and independent state grounds is to render an advisory opinion. The authors suggest that more

Another proposed solution is to deem the state grounds not sufficiently independent[76] of the federal grounds to preclude Supreme Court review whenever the state court fails to differentiate between federal and state grounds.[77]

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analysis of the nature of an advisory opinion is necessary before the label can be applied in this context. An excellent focal point for this definition is the following comment:

> The judicial function is essentially the function (in such case as may be presented for decision) of authoritative application to particular situations of general propositions drawn from pre-existing sources—including as a necessary incident the function of determining the facts of the particular situation and of resolving uncertainties about the context of the applicable general propositions.

HART & WECHSLER, *supra* note 42, at 66.

The cases that raise a federal question decided by the state court on adequate state grounds certainly satisfy this initial general statement. Moreover, there is a concrete set of facts, an adversary situation, and a definite legal issue. Supporters of the advisory opinion label would argue that under these circumstances, when the Supreme Court's decision is deprived or rendered ineffectual in the dispute, then, regardless of other conditions mentioned above, the decision is advisory. It is clear, however, that the decision is only potentially without "effect" in the dispute, since the Supreme Court cannot predict that the state court will in fact decide contrary to the Supreme Court on state grounds. The decision would become "advisory" (the authors would argue "unnecessary") in retrospect if and only if the state court chose to interpret state law and, in so doing, interpreted it in such a way as to negate the impact of the Supreme Court's decision.

In reference to the alleged lack of "effect" of court's decision in these cases, Professor Bice makes the following points:

> By deciding both federal and state grounds, the State Court has presented the successful litigant with the decided advantage of the Federal Bar. If he loses this Bar, he has lost a significant portion of his victory below. A Supreme Court decision on a federal question is therefore, not "useless." It serves the important function of affirming or removing the Federal Bar and of possibly remedying an intrusion into the balance of powers in state governments. Moreover, in many cases the court will also provide a clarification of federal law which may have importance in pending or future litigation.

Bice, *supra* note 71, at 765.

In this context, Professor Sandalow gives an example of the importance of deciding the federal question.

> Perhaps the most frequently recurring of the situations in which an assertion of such power by the Court would be useful is that in which the state court has invalidated a statute under both state and federal constitutions . . . . Even when it does not seem likely that the judgment in the case at bar will be affected, thought must be given also to the potential impact in other cases and the desirability of assuring that 'the responsibility for striking down or upholding state legislation be fairly placed.'

Sandalow, *supra* note 43, at 202.

In response to this statement, those arguing that these decisions are indeed advisory would undoubtedly say that what makes them advisory is their lack of impact on the contending parties; *i.e.*, the party winning the decision before the Supreme Court does not ultimately prevail in state court. This definition has the virtue of narrowly specifying the meaning of effect, but also mandates that the definition of advisory turn almost exclusively on the Court's impact on the final resolution of the dispute in question. Bice argues that this is too narrow a view of advisory opinions. The authors agree, but would go further and argue that to make the idea of an advisory opinion turn on whether the decision of the court has the specific impact on the parties decreed by the court creates some serious problems. If the definition turns on impact, then a great number of Supreme Court decisions have, in retrospect, been advisory insofar as the contending parties are concerned. In numerous cases and for a variety of reasons the Court has had little impact on these parties. S. WASBY, *supra* note 17, at 196-203. *See also* sources cited in note 17, *supra*.

For these reasons the authors believe that the current advisory-opinion rationalization is not an adequate ground for refusing review in these cases. Nonetheless, as indicated, they do believe that there are other grounds for refusal to review the case on the merits.

76. *See* note 35 *supra*.

77. This proposal was suggested, but not supported in Note, *State Constitutional Guarantees as Adequate State Ground: Supreme Court Review and Problems of Federalism*, 13 AM. CRIM. L. REV. 737, 759 (1976).

Furthermore, the Supreme Court could remand after rendering a decision on the federal question.[78] This proposal would require a modification of the Adequate State Grounds Doctrine. The modification would allow the Court, after deciding the federal question and remanding to state court, to review the controversy arising under state law and to determine whether the state ground presents "substantial federal interests." If the Court finds that there are no local conditions or policies indicating the "desirability of divergence from the federal rule," state grounds would not be deemed adequate to insulate the decision from further Supreme Court review.[79] This proposal would, however, require a balancing of the contending interests in each case. Moreover, it would require a multiplication of judicial review rather than a reduction of the Court's review of state decisions. Under this proposal, when a decision rests on both federal and state grounds, whether the grounds are ambiguous or not, the Court would first decide the federal question and then remand to the state court for another determination. If the state court decided to rely on its own laws, specific justification for that decision would have to accompany its decision. Thereafter, the Court, would review that decision, balancing state justifications with federal considerations, and make a decision based on the adequacy of the state court's rationale. Since this proposal requires the exertion of great judicial effort, it would seem that a far more pressing need will have to be adduced before such a procedure will ever be adopted[80] or even seriously considered by the Court.

Instead, the authors propose that the Court should grant review of all state-court decisions that rest on ambiguous state grounds. It should then vacate and remand the case to the state supreme court for clarification as to which particular law constituted the basis for the state court's decision. Ostensibly, this is the current rule under which the present Court oper-

78. *Id.* at 760.

79. *Id.* at 778. The motivation for this proposal is rooted in the author's concern that the adequacy rule only allows the state court to exercise independence from the Supreme Court, but does not set forth the criteria that "the state court should use to determine whether it may justifiably differ from the federal rule." *Id.* at 744. This proposal has some fairly radical consequences. As the authors interpret the proposal, it means that if a state supreme court bases a decision on a provision of its constitution that is similar to a provision of the Federal Constitution, and the court's rationale is, for example, that the reasoning of the dissent in a Supreme Court decision is more persuasive than that of the majority, the state court decision would not establish adequate state grounds and would be reviewable by the Supreme Court. In short, this proposal would require state supreme courts to justify their reliance on state constitutions and to face the possibility of reversal if the Court finds, "a federal interest of primary importance." *Id.* at 755. Whether there is a problem of such proportion to justify this step is questionable. *See* notes 78-80 and accompanying text *supra*.

80. The author of the article at note 77, *supra* is aware that the expanded scope of review would burden the Court, but contends that the Court's proper exercise of discretion will enable it to screen out meritless cases. *Id.* at 762-63. Of course, other things being equal, this means that the Court will have to limit the number of cases it otherwise might wish to review.

ates,[81] although it is sometimes ignored[82] and sometimes applied with unprecedented strictness.[83] In applying Justice Marshall's rule as interpreted and modified, the Court should remand all cases in which a state-law issue was raised and in which it is clear that the state court relied on federal law. Even if there is no facial ambiguity, the authors consider mere presence of a properly raised state law issue a sufficient "ambiguity" to warrant remand to the state court.

If the Court were to decide such a case without first remanding, as Professor Bice suggests, then it is always possible that the state court on remand would rely solely on state law to uphold its prior decision and thus render the Supreme Court's decision unnecessary.[84] By remanding immediately in all cases in which a state-law issue was raised but not resolved by the state courts, this possibility could be eliminated. In addition, a state court could not insulate its decision from review.[85] If the state supreme court decided on remand that its initial opinion was correctly based on federal law, the Supreme Court could review. In the alternative, if the state court decided that its former opinion was based on state law, that decision could be overturned or modified by the normal state political process.[86] This would insure that the political balance within the states is not destroyed.

Justice Marshall's rule, as modified, is supported by all of the previously mentioned constitutional and policy grounds that justify the Adequate State Grounds Doctrine, including the rule against advisory opinions.[87] There are additional practical reasons supporting the adoption of the rule that warrant discussion.

IV. The Marshall Rule and Policy Considerations

Justice Marshall suggested in *Hass* that state courts should more frequently apply state law when they consider constitutional liberties. Underlying his proposal is the assumption that if the Supreme Court remands cases, state courts will be required to analyze state law more thoroughly and to rely more frequently on state laws for their decision. In support of his rule he offers the following rationale:

> In addition to the importance of avoiding jurisdictional difficulties, it seems much the better policy to permit the state

81. Paschall v. Christie-Stewart, Inc., 414 U.S. 100 (1973); Minnesota v. Nat'l Tea Co., 309 U.S. 551 (1940).

82. *See* Oregon v. Hass, 420 U.S. 714, 726 (1975) (Marshall, J., dissenting).

83. *See* Paschall v. Christie-Stewart, Inc., 414 U.S. 100 (1973).

84. State v. Opperman, —S.D. —, 247 N.W.2d 673 (1976), is a good illustration of this possibility.

85. *See* note 73 and accompanying text *supra*.

86. Such state court action would satisfy Professor Bice's objections. *See* note 71 and accompanying text *supra*.

87. In addition, Justice Marshall's proposal is "consistent with the respect due the highest courts of states of the Union that they be asked rather than told what they have intended." Herb v. Pitcairn, 324 U.S. 117, 128 (1945).

> court the freedom to strike its own balance between individual rights and police practices, at least where the state court's ruling violates no constitutional prohibitions.[88]

He apparently believes that constitutional rulemaking will be enhanced by decentralization; according to this theory, the balancing process between individual rights and police practices should be controlled by the state rather than the Supreme Court, since these matters are "peculiarly within the competence of the highest court of a state."[89] In addition, state courts, by granting greater rights through their own constitutions will have reintroduced the possibility of experimentation inherent in the federal system. This is a development that has been lauded by many Justices including Brandeis, Harlan, Frankfurter, Burger, and Powell, as well as more recent converts like Marshall and Brennan. It is a concomitant benefit of the decentralization suggested by Justice Marshall.

The incorporation of most of the Bill of Rights into the fourteenth amendment during the Warren Court years resulted in a centralization of the criminal justice system and drastically curtailed state experimentation. Justice Powell argued against incorporating "jot for jot and case for case" every element of the sixth amendment into the fourteenth for just this reason.[90] That decentralization, particularly in the realm of criminal justice, has received much support is illustrated by the fact that Chief Justice Burger apparently agrees with Justices Marshall and Powell.

> I add this comment only to emphasize the importance of allowing the States to experiment and innovate, especially in the area of criminal justice. If new standards and procedures are tried in one State their success or failure will be a guide to others and to the Congress.[91]

The encouragement of decentralization and the correlative possibility of experimentation are advantages that should not be relegated to a past era.[92]

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88. Oregon v. Hass, 420 U.S. 714, 728 (1974).

89. *Id.*

90. Johnson v. Louisiana, 406 U.S. 356, 375 (1972) (Powell, J., concurring) (quoting Justice Harlan's dissent in Duncan v. Louisiana, 391 U.S. 145, 181 (1967)).

91. California v. Green, 399 U.S. 149, 171 (1970) (Burger, J., concurring).

92. One commentator seems less impressed with this argument. Note, *State Constitutional Guarantees as Adequate State Ground: Supreme Court Review and Problems of Federalism*, 13 AM. CRIM. L. REV. 737, 748, 778 (1976). His view of the adequate state ground is that it rests on an anachronistic concept of federalism. He argues that, since "dual federalism" has been replaced with "cooperative federalism," what one person can do and the other cannot is simply a function of "an accommodation of interest." What the writer has done, it seems, is to make an illogical leap. Simply because the Court and Congress have rejected a conception of federalism that views every activity of the national government as an intrusion into states rights, this does not dictate the idea of state autonomy has been rejected, and it certainly does not follow that such a conception is not pertinent to modern conditions. That this is true as a matter of constitutional law has been settled recently by the Supreme Court's decision in National League of Cities v. Usery, 426 U.S. 833 (1976). In that decision the Court said,

> It is one thing to recognize the authority of Congress to enact laws regulating individual businesses necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside. It is quite another to uphold a similar exercise of congressional authority directed not to private citi-

An additional benefit of important practical effect is that Justice Marshall's proposal would promote judicial economy. Of all the state court cases reaching the Supreme Court, fifty-four percent are criminal cases and most of the cases in which a corresponding state-law issue is raised in state courts are criminal cases.[93] It is fair to assume that as more state courts are required to initially consider state-law issues, more criminal cases will be decided on state-law grounds and will not add to the already burdened Supreme Court docket.[94]

V. Objections to the New State Court Activism

Some concern has been expressed about the developments that Justices Brennan and Marshall wish to encourage. One of these concerns relates to the lack of uniformity in the law that would result from this development. It is not clear what serious problems this would raise in addition to nonuniformity itself, and it is certainly not clear that any of the problems that would result outweigh the benefits of a revitalized state judiciary. As Professor Howard wrote in his lengthy review of state supreme court activity, "Both constitutional history and theory support the case for an independent body of state constitutional law."[95]

A second concern is that if states are required to look at their own law first, this may foster a situation in which the state constitutions would become the primary guarantors of individual rights and the Federal Constitution would supply only the minimal safeguards. One author comments,

> After a decade of Warren Court activism in which federal rights assumed unheard of importance in state criminal trials, the decisions of the Burger Court indicate that henceforth the Constitution will assure only basic standards of protection, and all rights above this minimum level will exist, if at all, only by virtue of state law.[96]

If the Federal Constitution is to become an insurer of only basic standards, then no tangentially related change such as the one proposed by the authors will alter that result. The extent of this development will be determined by the decisions of the Supreme Court and the willingness of state courts to develop their own independent body of state constitutional law.

> zens, but to the States as States. We have repeatedly recognized that there are attributes of sovereignty attaching to every state which may not be impaired by Congress . . . because the Constitution prohibits it from exercising the authority in that manner.

Id. at 845. While some may treat the federal system as if it rested on nothing more than "a balancing of interests," this is not yet the holding of the courts and does not represent a desirable direction.

93. Stolz, *supra* note 69, at 983.

94. *See also Report by the Commission on Revision of the Federal Court Appellate System, Structure, and Internal Procedures: Recommendations for Change* (1975).

95. Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 935 (1976).

96. *See* Wilkes, *supra* note 15, at 425-26.

While it is likely that adoption of this rule will encourage some state-court activism, it is not likely that all or even a majority of state courts will move in this direction. Even if many of the courts were to strike out on their own, it is important to note that before the Warren Court held nearly all of the Bill of Rights applicable to the states, the Bill of Rights was deemed a constraint on only the federal government,[97] and as Professor Hart noted, "in the scheme of the Constitution, [the state courts] are the primary guarantors of constitutional rights, and in many cases they may be the ultimate one."[98]

> A third objection to this developing trend is perhaps more serious. The problem, then, is not to determine whether the nation can profit from independence and diversity among the various states, nor is it to determine whether the states have the power to impose higher state constitutional standards, for both these questions were answered when the nation was founded. The concern should more properly be to set forth articulable criteria . . . when state constitutional standards may justifiably differ from federal constitutional standards.[99]

One aspect of this danger is that a state court may make "no more than pro forma effort to justify its making independent use of state constitutional grounds."[100] A second aspect is that courts may use their state constitutions to strike down economic regulations that would be permissible under federal law.[101] This is not, however, a new development, and there is no reason to believe that state courts, already not so inclined, will move in that direction.

VI. Conclusion

Justice Marshall has devised a practical and constitutionally sound rule to prevent the Court from being drawn into situations in which its opinions would be rendered moot by subsequent state-court action. The Court should adopt Justice Marshall's rule with the previously mentioned modifications. Simply stated, the Court should refuse to review any state-court decision in which an issue of state law was raised by the litigants,

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97. Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 242 (1833).

98. HART & WECHSLER, *supra* note 42, at 359.

99. Comment, *The Scope of Search Incident to Arrest in California: Rejecting The Federal Rule*, 9 U.S.F.L. REV. 317, 338 (1974).

100. Howard, *supra* note 15, at 934-35. Professor Howard has offered a series of guidelines that he believes state courts ought to consider in deciding whether to strike out on their own.

101. Such judicial conduct would not be a new development by any means. *See, e.g.*, Ives v. South Buffalo Ry., 200 N.Y. 271, 94 N.E. 431 (1911), in which the New York Court of Appeals struck down a state workmen's compensation statute on both state and federal constitutional grounds. Also, when the Supreme Court ruled that secular textbooks purchased for parochial and public schools did not constitute a violation of the establishment clause of the first amendment, the Supreme Court of Oregon in Dickman v. School Dist., 232 Or. 238, 366 P.2d 533 (1961), circumvented that decision by relying on its own constitution and struck down such aid as a violation of the doctrine of separation of church and state. For a more complete survey of this earlier state court activity, see Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91 (1950).

but was not resolved by the state court, which instead based its decision on federal law. In all such cases the Court should vacate and remand to compel the state court to resolve any issue of state law. This approach maintains the proper political balance in the state political arena, resolves the problem of the ambiguous state grounds, decentralizes the criminal justice system, and promotes judicial economy. Chief Justice Burger in a bicentennial address made the following perceptive comment:

> The fifty states cannot exercise leadership in a national sense, but this does not mean they should not be allowed the independence and freedom that was plainly contemplated by the concept of federalism.[102]

The authors concur.

102. Burger, *Interdependence of Our Freedoms*, 9 AKRON L. REV. 403, 406 (1976).